GREGORY & TATYANA BAYTLER	:	BEFORE THE
	:	HOWARD COUNTY
Appellants	:	BOARD OF APPEALS
vs.	:	HEARING EXAMINER
DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND	:	BA Case No. 660-D
Appellee		

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DECISION AND ORDER

On May 21, 2009 and August 25, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the departmental appeal of Gregory and Tatyana Baytler ("Appellants"). Appellants are appealing the Department of Planning & Zoning ("DPZ") letter of February 25, 2009, informing Appellants that their resubmission of SDP-08-086 could not proceed because they had not established the Subject Property is a "legally buildable lot."

Appellants certified to complying with the notice and posting requirements of the Howard County Code.

I viewed the Subject Property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented Appellants. Paul T. Johnson, Deputy County Solicitor, represented DPZ. Sang Oh, Esquire, represented Vincent S. Serio. Tatyana Baytler testified on her own behalf. Marsha McLaughlin, DPZ Director, and Tina Hackett, DPW's

Chief of Real Estate Services testified on behalf of DPZ. Warren Anderson testified in opposition to the construction of a dwelling on the Subject Property.

Exhibits

Appellants introduced into evidence the following exhibits.

Date	Exhibit No.	Description of Exhibit
	A	Copy of SDP to show property
6/23/66	B	Condemnation Award and Report
1965	C	SHA plat showing creation of Route 99 (Admitted for limited purpose of establishing historical time line)
2/19/93	D	SHA conveyance to Howard County
8/18/05	E	Letter to Snider awarding him appraisal work
8/23/05	F	Letter from Snider to Serio informing him of inspection of property
9/2/05	G	Appraisal
7/24/05	H	Resolution 95-2005 authorizing sale of property
2005	I	Legislative background on Resolution
11/9/05	J	Memo from Tina Hackett re: RFP
1/06	K	Invitation for Bids to bid on property
	L	Exhibit Excluded (not admitted into evidence)
2/27/06	M	Emails between Tatyana and Teresa Lemon, then Tina Hackett
6/16/06	N	Deed from County to Baytler
2/15/07	O	Variance staff report
4/10/08	P	Email between Jill Farrar, Bob Lalush and Cindy Hamilton

4/25/08	Q	Letter from DPZ to Tatyana Baytler informing her that SDP-08-086 does not conform to objectives of subdivision and land development regulations
6/6/08	R	Letter from TMM to Cynthia Hamilton re: comments
6/9/08	S	Letter from Civil Design Services to Jill Manion-Farrar addressing DPZ's SDP comments
7/24/08	T	Second letter from DPZ to Tatyana informing her that SDP-08-086 does not conform to objectives of subdivision and land development regulations
8/11/08	U	Letter from TMM to Cynthia Hamilton addressing comments in second DPZ letter
8/19/08	V	Letter from TMM to Cynthia Hamilton discussing the appraisal
8/20/08	W	Letter from TMM to Cynthia Hamilton enclosing SDAT assessment valuing property at $249,200
10/20/08	X	Letter from TMM to Andrew Porter at Civil Design Services re: estoppel
10/21/08	Y	Letter to Jill Manion-Farrar from Civil Design Services addressing DPZ's comments
12/5/08	Z	Third letter from DPZ to Tatyana informing her that SDP-08-086 does not conform to objectives of subdivision and land development regulations
1/13/09	AA	Letter from TMM to DPZ addressing the legal creation of the lot
1/16/09	BB	Letter to Jill Manion-Farrar to Civil Design Services addressing DPZ's SDP comments
2/25/09	CC	Letter from DPZ to Tatyana affirming its original decision that lot is not a buildable lot

<u>Documents from SDP 07-025</u>

12/7/05	DD	Boender file - Notes from meeting

1/10/85	EE	Original plat of Boender property
12/7/04	FF	Drawing of property returned by SHA
	GG	Section 16.102 of subdivision regulations
	HH	16.100(E) of the Zoning Regulations and 1993 version
5/3/06	II	Letter from Boender to Marsha McLaughlin enclosing copy of recorded confirmatory deed
3/1/06	JJ	Confirmatory Deed from SHA to Glenmar Joint Venture
3/1/06	KK	Confirmatory Deed, marked, in County file
10/19/06	LL	Letter from DPZ to Charter Homes informing him that SDP 07-25 (Glenmar) does not conform to subdivision and land development regulations
6/14/07	MM	Plat of Glenmar, with note 33
5/3/09	NN	Letter from James Irvin, Director of Public Works, to Thomas M. Meachum addressing Mr. Meachum's comments

DPZ introduced into evidence the following exhibits.

a. Email correspondence between Tina Hacket, Teresa Lemon, and Tatyana Baytler concerning Bid #06-058, Sale of Surplus Land

b. April 20, 2007 e-mail correspondence from Marsha McLaughlin to Robin Regner and Paul Johnson, concerning BA 06-047V, Vincent S. Serio, Appellant

c. 3A, 3B, 3C, Recorded Plats, various dates

d. May 20, 2009 letter from Letter from James Irvin to Thomas M. Meachum clarifying his letter of May 3, 2007

e. Portion of transcript from Board of Appeals held May 15, 2007 in the matter of BA 06-047V, Vincent S. Serio, Appellant

Mr. Serio introduced into evidence the following exhibits.

1. Maryland Department of Assessments and Taxation, Real Property Data Searches for four Properties owned in part by Tatyana Baytler

2. Transcript from Board of Appeals Hearing Examiner hearing held February 26, 2007, in the matter of BA 06-047V, Tatyana Baytler, Petitioner

General Background and History

In 1966, the Maryland State Road Commission condemned portions of several properties for future rights-of-way improvements relating to I-70N from the Patapsco River to Route 40 (Appellants Exhibit B). The condemnation included a portion of Donald R. Stirn's property, as designated on Plat No. 29886. Plat No. 29886 notes the State acquired the property for the "Relocated Md. 99" (Appellants Exhibits B & D). The land for the Relocated MD 99 (now Rogers Avenue), which included more than that taken from Mr. Stirn, was located in part along what is now the northeast corner of Rogers Avenue and its intersection with Orchard Avenue. The ROW taken also included a portion of the east side of Orchard Avenue. In 1993, the State Highway Administration (the "SHA") (the state road commission's successor) determined it no longer needed the right-of-way ("ROW") recorded as Plat No. 29886 and conveyed it by deed to Howard County. Page 11 of the recorded deed stated in pertinent part that the Grantor[] "FURTHER GRANT[s] unto Howard County, Maryland the Denial of Vehicular Access Controls" shown on Plat No. 29886.

Vincent S. Serio is the owner of 8880 Old Frederick Road, which adjoins the Subject Property to the south.[1] The property is something of a triangular island, being bordered on the north by MD 99 (Rogers Avenue), on the south by MD 144 (Frederick Road) and on the west by Orchard Avenue. This property is improved by a single-family detached dwelling. A tenant occupied the dwelling in February 2007. Mr. Serio acquired the property by deed from the estate of his uncle, Anthony Serio, in February 2005. Anthony Serio was, apparently, a subsequent owner of Mr. Stirn's property.

When Vincent Serio, who is in the real estate and development business, reviewed the deed, he believed his island property was larger than the 1.86 acres described in the deed. Through research, he learned the County owned land along MD 99 and Orchard Avenue. In 2005, Mr. Serio asked the County to sell him some part of the land included in the ROW designated on SHA Plat No. 29886 and now owned by Howard County. At a subsequent public hearing, he testified to wanting the land to add to his back yard. (Serio Exhibit 1, p. 43.)

The Department of Public Works ("DPW"), a public agency, determined the County no longer needed the ROW and agreed to the request.

The County Council adopted Resolution No. 95-2005 pursuant to Howard County Code ("HCC") Section 4.201, which authorizes the County Executive to dispose of real property no longer needed for public purposes. The Resolution described the surplus land as "being a portion of the existing Right of Way of Maryland Route 99-Rogers Avenue and Orchard Avenue consisting of approximately 1.38 acres more or less, adjacent to 8880

[1] Mr. Serio resides at 2965 Brookwood Road, Ellicott City Maryland.

Rogers Avenue . . . " and authorized the County Executive "to convey the Property after the Property is subdivided from the rights of way to be retained by the County, by formal, written contract to the highest responsible bidder at a price which is equal to or in excess of the value of the Property established by an independent appraisal prepared for and at the expense of the bidder . . . " (emphasis added). The one-page legislative staff report summarizes Resolution No. 95-2005 as providing "the County may sell rights-of-way along Orchard and Rogers Avenue in Ellicott City" and that "if Mr. Serio is the successful bidder, he plans to subdivide, adding three houses to the one that is there now." (Appellants Exhibit I.)

The County awarded appraiser William Snider the assignment to appraise the ROW by letter dated August 18, 2005 from Tina Hackett, DPW's Chief of Real Estate Services. The letter also requested Mr. Snider to contact Vincent Serio when Mr. Snider was ready to appraise the Subject Property. Mr. Snider contacted Mr. Serio by letter dated August 23, 1009, inviting him to accompany him on his inspection of the property and to submit any pertinent written comments.

Mr. Snider's summary report of September 2, 2005 describes the property as being zoned R-20 (Residential: Single Family), which as a matter of right permits the development of a single-family detached dwelling unit on a 20,000 square foot lot. Zoning regulations require an 80-foot lot width at the building restriction line, a 50-foot front setback, and a 30-

foot rear setback.[2] The report also notes a possibility for the reduction of some setbacks with additional open space. The Utilities section notes the Subject Property as having public water, sewer, electric, and telephone available. The appraiser based the appraised value on the property's being subject to a plat restriction noting "Denial of Vehicular Access Controls" along (MD 99) Rogers and Orchard Avenues.[3] In light of these considerations, Mr. Snider derived a $21,200 just compensation value for the Subject Property, a 90% discount from the $212,000 fair market value of the lot without the access restriction.

The Howard County Office of Purchasing, a public agency, apparently opened the bidding for the sale of the Subject Property (Bid No. 06-058) in January 2006, instructing bidders that it would receive their sealed bids until January 31, 2006. Mr. Serio unsuccessfully bid on the Subject Property. Appellants were the winning bidders, having bid $31,000 for the property.

Before bidding, and apparently after the County informed Ms. Baytler of her successful bid, Ms. Baytler, a licensed real estate agent, corresponded by email with Teresa Lemon, a county purchasing agent/buyer, with queries about the Subject Property's zoning, subdivision potential, and access. Ms. Lemon forwarded one of Ms. Baytler's email's to Tina Hackett, DPW's Chief of Real Estate Services, who reminded her that the bidding document instructed all bidders to verify the uses permitted in the R-20 zoning district with DPZ. (Appellants Exhibit M, DPZ's Exhibit 1.) On June 16, 2005, Howard County transferred title

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[2] In 1961, the minimum lot width for an R-20 lot was 80 feet. In 1977, the minimum lot width became 60 feet. A 1989 revision established an 80-foot minimum lot width for lots greater than 18,000 square feet and a 60-foot width for lots smaller than 18,000 square feet. In 1993, the minimum lot was set at 60 feet for all lots.

[3] Appellants' documentary testimony and oral arguments appear to refute the appraiser's conclusion about a lack of access.

to the Appellants by deed. When Appellants bid on the Subject Property, they were also the owners of three residential properties in Howard County.

Early in 2007, Ms. Baytler submitted a variance petition for the Subject Property to the Hearing Examiner, requesting a variance from Section 108.D.4.a(1)(a)(ii) to reduce the 50-foot setback from an arterial ROW to 35 feet for a proposed single-family detached dwelling on what was stated to be a 1.42-acre property. At the variance proceeding, Ms Baytler testified to wanting to build a 2,260 square-foot house for her family on the Subject Property. She also testified the proposed driveway was off Orchard Avenue, as the county preferred, not MD 99 (Rogers Avenue). Ms. Baytler further testified to having gone to DPZ's Service Desk a couple of times and spoke to a civil engineer and other persons who informed her she would be able to access the property from Orchard Road. At the hearing on Mr. Serio's appeal of the Hearing Examiner's decision to approve the variance petition, she testified to having spoken to persons in DPZ before the bidding and to a private civil engineer.

Mr. Serio testified at the proceeding to asking Ms. Baytler to sell him the property, which she agreed to do for $300,000. He further testified that James Irvin, the Director of Public Works, had informed him that no access would be permitted off Orchard Avenue or Route 99 (Rogers Avenue). (Serio Exhibit 1.) Mr. Serio appealed the Hearing Examiner's decision to approve the variance petition. The Board of Appeals heard the appeal de novo on May 15, 2007 and granted the variance.

Sometime after the variance proceeding, Appellants submitted a site development plan (SDP-08-086) to DPZ to construct a single-family detached dwelling on the Subject

Property. During DPZ's review of the SDP in April 2008, Mr. Serio asked DPZ if the lot was "buildable." (Appellants Exhibit P). Beginning with its April 25, 2008 letter to Appellants, DPZ informed Appellants that SDP-08-086 does not conform to the Subdivision Regulations, based in main part on comments from the Division of Land Development ("DLD"). These comments state Appellants have not explained how the Subject Property is exempt from the Subdivision Regulations regarding the creation of the lot, emphasizing "it has not been determined" the Subject Property is a "legally created lot" or a "buildable lot." DLD maintained the property is merely "excess right-of-way," and disagreed with Appellants' contention that the property is exempt from Subdivision and Land Development Regulations Section 16.102(b) "regarding the creation of the property." DPZ continued these objections to SDP-08-086 in a second action letter and at least one meeting. (Appellants Exhibits T.)

DPZ's third action letter of February 25, 2009, the ruling being appealed, reaffirmed its original decision that SDP-08-086 does not conform to the Subdivision Regulations in pertinent part because the lot was not legally created as a buildable lot. Responding to Appellants' reliance on Section 16.102(b) as a subdivision exemption, DLD stated it applies only during the process of land acquisition or disposition and does not address the sale of excess right-of-way. DLD further commented that neither the underlying R-20 zoning nor the presence of utilities would automatically ensure the lot would be permitted to include a home if it did not meet the other Subdivision Regulations, and "did not follow the procedure and meet the regulations necessary to create an individual lot where one did not previously exist."

Three letters attached to the appeal petition summarize the alleged errors of fact, or law, presented by the appeal. The first, a June 6, 2008 letter from Mr. Meachum to Ms.

Cindy Hamilton, DLD Chief, avers the County properly followed the procedure set out in Howard County Code ('HCC") Section 4.201 by conveying the deed to Appellants as the successful bidders. The letter also queries previous DLD comments that there "has been no explanation provided showing the property's exemption from the Subdivision Regulations, observing DLD failed to offer what section would be applicable to the lot, or what process should be followed to create the lot, given that the County had subdivided the parcel and sold it on the open market." The letter assumes the comment refers to the procedures set out in Sections 144-147.

The October 20, 2008 letter from Mr. Meachum to Andrew A. Porter (which apparently was forwarded to DPZ), contends the County would be estopped from asserting the property cannot be used for a building parcel because the County illegally created the lot.[4] The January 13, 2009 letter from Mr. Meachum to Ms. Cindy Hamilton contends the County intended the Subject Property to be a buildable lot based on information in the bid document.

Standard of Review

Pursuant to Rule 10.2(c) of the Hearing Examiner Rules of Procedure, in an appeal of an administrative agency decision, the petitioner must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

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[4] Mr. Porter is a civil engineer. The letter instructs Mr. Porter to include the letter with his submission.

Discussion

A. DPZ's Factual Rationales for Its Determination that the Subject Property is Not a Buildable Lot: The County[5] Never Intended the Subject Property to be Disposed of as a Buildable Lot

County Council Resolution 95-2005 described the Subject Property "being a portion of the existing Right of Way of Maryland Route 99-Rogers Avenue and Orchard Avenue consisting of approximately 1.38 acres more or less, adjacent to 8880 Rogers Avenue . . ." It expressly authorized the County Executive "to convey the Property after the Property is subdivided from the rights of way to be retained by the County, by formal, written contract to the highest responsible bidder at a price which is equal to or in excess of the value of the Property established by an independent appraisal prepared for and at the expense of the bidder . . . "

DPZ argues the County never intended the Subject Property to be a "buildable lot," by which they mean generally an individual property upon which a single-family detached dwelling could be built, because the County always intended Mr. Serio to the sole bidder on the Subject Property. How did the County manifest its intention that the lot was not "buildable?" First, through the actions of Mr. Serio, who instigated the process by which the County determined to surplus the property. According to Ms. McLaughlin, the County understood that once Mr. Serio successfully bid on the surplus property, as the sole intended or likely bidder, he would merge his inherited land with the Subject Property and resubdivide

[5] I adopt DPZ's use of the word "County" to identify the governmental party in this case. However, based on the record, two public agencies were the primary players in conveying the Subject Property, the Office of Purchasing and the Department of Public Works.

the two lots to create several new conforming lots. Second, through the $21,200 appraisal price and the description of the description of the property in the Invitation for Bids.

In response, Appellants first claim, correctly, that DPZ failed to point to anything to support its assertion that Appellants were on notice of the County's intentions, such that they could reasonably conclude the lot could not be built upon. Second, the legislative staff report for Resolution No. 95-2005contradicts DPZ's assertion that Mr. Serio was always intended to the sole purchaser, as it points out that Mr. Serio plans to subdivide the property, adding three houses, *if* he is the successful bidder. (Appellants Exhibit I.). The County Council's use of the conjunction "if" in its plain meaning connotes a hypothetical condition, an uncertain possibility; Mr. Serio *might* be the successful bidder.

Appellants further argue the County errs in relying on extra-statutory manifestations of intent for its decision that the lot is not legally buildable because the Howard County Code prescribes how the County's intentions for public properties it sells through HCC Title 4, Section 4.201, are to be noticed.[6] Section 4.201(a) establishes the administrative process for

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[6] Sec. 4.201. Disposition of real property, provides as follows.

(a) Except as hereinafter provided, any property acquired by the county by gift, purchase, lease, condemnation or otherwise, except by or through a tax sale or conveyance from the Howard County School Board as surplus school property and no longer needed for public purposes may be disposed of as the council may, by resolution, provide. The Council shall, in the resolution providing for the disposition of real property, declare that the same is no longer needed for public purposes and shall authorize the County Executive to sell the same by formal, written contract to the highest responsible bidder, after public advertisement inviting proposals for three successive weeks in one or more newspapers of general circulation published in Howard County. The advertisement shall state the location and description of the property and such terms and conditions as the Council may provide. The Council may, in its resolution, provide that the sale of said public property shall be by public auction, giving the terms and conditions thereof; and said auction shall be advertised as to time and place for three consecutive weeks in one or more newspapers of general circulation in Howard County, stating the location and description of the property and such terms and conditions as the Council may provide.

(b) The County Council may, upon request by the County Executive and after public hearing that has been duly advertised, by its resolution, authorize the County Executive to waive the advertising and bidding

disposing of public real property. The County Council adopts a resolution declaring the property is no longer needed for public purposes and authorizes the County Executive to sell it by contract to the highest bidder after public advertisement, subject to any terms and conditions as the Council may provide. Alternatively, pursuant to Section 4.201(b), upon the County Executive's request and after public hearing, the County Council by resolution may waive the advertising and bidding requirements for an individual conveyance.

With respect to the disposal of the Subject Property, Appellants maintain the County had two ways to manifest its intent that a single-family detached dwelling could not be built on it, to have imposed this express condition on the sale of the surplus property, as is permitted by Section 4.201(a), or to have made an individual conveyance of the real property to Mr. Serio, per Section 4.201(b).

Appellants are correct. Article 25(A), §5(B) of the Annotated Code of Maryland, authorizes Howard County, as a charter county, to:

> . . . provide for the acquisition of public property for public purposes in the county and to dispose of any real or leasehold property belonging to the county . . . provided the same is no longer needed for public use . . . upon such terms and compensation as said county may deem proper, and after such disposition . . . shall have been advertised once a week for three successive weeks in one or more newspapers of general circulation published in said county, stating the terms thereof and the compensation to be received therefor, and giving opportunity for objections thereto.

Section 102(B) of the Howard County Charter authorizes the County Council, the County Executive, and other agents and employees, as authorized, to "dispose of any real or

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requirements of this section for an individual conveyance of real property if, in the judgment of the County Council and the executive, the interests of the county will be best served thereby.

leasehold property belonging to the county, provided the same is no longer needed for public use." As the foregoing discussion explained, HCC Section 4.201 is the administrative procedure for surplusing public real property. The two alternative methods of conveyance provide Howard County the flexibility it needs to dispose of public property in ways that best suit the corporation's needs.

A conveyance of public real property no longer needed for public purposes must follow the disposition of property administrative procedure in Section 4.201. When the County determined to surplus what would become the Subject Property, the County Council chose, through Resolution No. 95-2005, to dispose of the land by contract to the highest bidder, as best suited the corporation's needs. Had the County intended that the successful bidder could not build a dwelling on the land, the proper location for manifesting this intent was in the Resolution and advertising.

B. Legal Manifestations of the County's Intent That the Division of Property by Deed of Sale to Appellants Was Not to Create a "Buildable Lot

We come now to the gravamen of this appeal—whether County laws and regulations manifest a clear legislative intention that a division of land pursuant to Section 4.201(a) is "unbuildable" if the public divider has not first partitioned surplus real property through the Subdivision Regulations.

1. The Applicability of Section 16.102(b)

Section 16.102 of the Subdivision Regulations provides that the regulations "shall apply to all division of land and all development situated in Howard County," with certain exceptions. Section 16.102(b) is one such statutory exception.

> Rights-of-Way or Land Acquisition or Disposition: The provisions of this Subtitle do not apply to parcel or lot line changes occurring as a result of highway, road, street, utility or other improvements which require acquisition or disposition of right-of-way or land by a public agency or a corporation regulated by the Public Service Commission, provided that any remaining lots shall be consistent with the Zoning Regulations.

Regarding 16.102(b), DPZ reads the words "requires" and "improvements" such that the exception applies only when the State or a county public agency actually had to construct the improvements. Since any state improvements were made some time ago and the County did not build a road or make improvements to Rogers or Orchard Avenues after it took title, the agency concludes the lot is illegal, DPZ argues the County created the Subject Property in contravention of the Subdivision Regulations.

Appellants assert through Mr. Meachum's January 13, 2009 letter to Ms. Hamilton and at oral argument, that the County's action is exempt under Section 16.102(b) because the provision does not mandate actual physical improvements when a public agency disposes of land or a right-of-way. In the alternative, they contend the State at some juncture made improvements to the larger land area it had condemned in 1966.

An administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Marzullo v. Kahl*, 366 Md. 158, 783 A.2d 169 (2001) (internal citations omitted). An exception to this rule is that an administrative agency is entitled to no deference on pure questions of law. *Friends of the Ridge v. Baltimore Gas and Electric Co.*, 120 Md. App. 444, 707 A.2d 866 (1998).

A plain language reading of this exception does not support DPZ's interpretation of the words at issue. "Requires" in its ordinary meaning means "to have need of." Random House Dictionary of the English Language (2d ed.1987). Further, nothing about the word "improvement" or the context of its use supports DPZ's insistence on actual physical improvements. In its ordinary meaning, then, the exception applies to public agency actions that result in parcel or lot line changes occurring through the acquisition or disposition of rights-of-way or land for highway, road, street, utility or other improvements, provided any remaining lots are consistent with the Zoning Regulations.

In this case, it also appears the State earlier made some road improvements to the larger area. When the State Highway Administration determined it no longer needed the right-of-way recorded as Plat No. 29886 it conveyed to Howard County in 1993, who took title by deed—without undergoing subdivision. In dividing the property, the County (DPW, the Office of Purchasing, or both public agencies) created a parcel change by deed, subject to the necessary condition, as will be discussed below, that the remaining lot are consistent with the Zoning Regulations.

Functionally, Section 16.102(b) operates as a "public minor subdivision" exemption from subdivision control jurisdiction for public agencies charged with acquiring or disposing of public real property for certain improvements. It permits real property transfers without regard for the Subdivision Regulations. The County Council self-acknowledged this exemption in Resolution 95-2005, which authorized the County Executive "to convey the Property after the Property is *subdivided* from the rights of way to be retained by the County" (emphasis added.) As explained in the foregoing discussion, the County is not without

jurisdiction to control the lots or parcels affected by the public minor subdivision exception; under Section 4.201, it may impose conditions and terms on the sale of such land, or make an individual conveyance.

2. The Applicability Vel Non of the Glascock Rule

Appellants invoke the Glascock Rule in an alternative response to the County's claim that the division of land by deed to Appellants violated the Subdivision Regulations. The Glascock Rule stands for the legal principle that a local government is not bound by its own zoning regulations in the performance of its governmental duties unless it is provided in the zoning ordinance itself, by "clear and indisputable intention." *Glascock v. Baltimore County, Md.*, 321 Md. 118, 581 A.2d 822 (1990).

However, the rule is inapplicable to the instant case, as it immunizes governments from its own zoning regulations only in the performance of their governmental duties. *Glascock*, 321 Md. at 121, 581 A.2d at 824 (citing *Mayor and City Council of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977) (quoting *State v. Milburn*, 9 Gill 105, at 118 (1850) ("'. . . It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.'") "Municipal zoning regulations or restrictions usually do not apply to the State or any of its subdivisions or agencies, unless the legislature has clearly manifested a contrary intent. Thus, properties and the uses thereof may be immune or exempt from the operation of municipal zoning regulations where owned or controlled by counties, school districts or boards, park districts or like bodies, or by other agencies or subdivisions of the state."

In this case, the County was not putting public property to public use by selecting the site of buildings or other structures for public facilities, such as schools. *See e.g., People's Counsel v. Surina*, 400 Md. 662, 929 A.2d 899 (2007). Rather, in disposing of public property by deed, the County was acting in furtherance of its corporate duties. DPZ's Exhibits 3A, B, and C illustrate the County acting in such manner. The three plats concern a road dedication widening related to Bushy Park Elementary School, relocated lot lines and wetland buffers in relation to Western Park Elementary School and Park, and land consolidation into one buildable parcel for a government office building built in partnership with what appears to be a private party. The plats do not evidence the County acting in furtherance of its corporate duties, which in disposing of surplus property includes returning land to the tax rolls. In this regard, then, the County's reliance on these plats as evidence of a county policy to subject many divisions of public property to subdivision under Sections 144-147 is misplaced.

Assuming arguendo that Section 16.102(B) is inapplicable to the surplusing of the Subject Property, the County's division of land by deed to Appellants still does not conflict with the platting and recordation requirements of Section 144-147. Although the applicability provision states the Subdivision Regulations "shall apply to *all* division of land and all development situated in Howard County" (emphasis added), the word "all" does not take into its fold the actions of county public agencies, as Mr. Serio argued. The Maryland Courts have made clear that as a general principle, acts of the state legislature or its instrumentalities are meant to regulate and direct the acts and rights of citizens, and not include or affect the rights of government. *Baltimore v. State*, 281 Md. at 223-4 378 A.2d at 1329 (1977) (quoting

Justice Story in *State v. Milburn*, 9 Gill 105 (Md.1850). *Accord, Pan American Health Organization v. Montgomery County*, 338 Md. 214, 657 A.2d 1163 (1994). Indeed, there is a long county history of creating rights-of-way by deed, as Ms. McLaughlin conceded during the proceeding.

3. The Subdivision Regulations' Subject Matter Jurisdiction Over "Buildable" Lots .

DPZ made the determination that the Subject Property is not a "buildable lot" because it had not undergone review and approval through an act of division within the jurisdiction of the Subdivision Regulations. In prosecuting this view, it looks no further than the Subdivision Regulations themselves.

Observing initially that the term "buildable lot" is a manufactured term appearing nowhere in the Subdivision Regulations, Appellants press upon us the counter argument that DPZ's subject matter jurisdiction under the Subdivision Regulations does not include the power to determine whether a lot or parcel is "buildable." According to Appellants, this determination is made only through application of the whole of the administrative procedures and regulations for developing land in Howard County to a specific property.

As alluded to by the parties during oral argument, at the core of their quarrel in this case is the interpretation of the phrase "in accordance with the laws and regulations in effect at the time of recordation" in the definition of "lot or parcel." Although none of the parties expressly contended this language is ambiguous, their differing perspectives on what makes a lot "buildable" is rooted in their opposing constructions of this directive.

DPZ and Mr. Serio read the phrase narrowly and as backwards looking, requiring a parcel or lot to be in conformance, a priori, with all subdivision regulations at the time of its creation. Hence their conclusion that a lot or parcel is not buildable if it was created outside Sections 144-147 (apparently). Appellants construe the phrase within the broader statutory scheme comprising the land use development review and approval process in Howard County.

The phrase is arguably ambiguous. When words of a provision are ambiguous, we consider the context in which the provision appears and with respect to the context of the entire statutory scheme. The effort is to discern the meaning and effect of the language in light of the objectives and purposes of the provision enacted. Such an interpretation must be reasonable and consonant with logic and common sense. *The Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 814 A.2d 469 (2003).

Curiously, no party directed our attention to the fact that the Subdivision Regulations and Section 103.A.89 of the Zoning Regulations adopt the same definition of "lot or parcel." But given this statutory linkage, our solution of the interpretative riddle before us must ensure the phrase has the same application in both sets of regulations. A definition of a word applies whenever the term is used in an ordinance. *See e.g., Green v. Bair,* 77 Md. App. 144, 150, A.2d 762 (1988) (quoting *Ford Motor Land Dev. v. Comptroller of the Treasury*, 68 Md. App. 342, 511 A.2d 578 (1986)), *cert. denied, Green v. Bair*, 315 Md. 307, 554 A.2d 393 (1989). By analogy, the use of the same definition in the larger statutory scheme requires it to have the same meaning throughout. Although Appellants did not characterize their argument as what make a lot or parcel buildable in these terms, their analysis that

"buildability" is a factual determination made by processing land through the statutory land use administrative scheme in Howard County, is a convincing perspective on the appropriate interpretation of "in accordance with the laws and regulations in effect at the time of recordation."

Their analysis begins with the proposition that the Subdivision Regulations recognize the possibility of a division of land by deed in the definition of a "lot or parcel." This legislative intention is repeated in Section 16.155(2)(iii), which provides that a site development plan approved by DPZ is required for the development of single-family detached residential lots and *deeded parcels* within the Planned Service Area for both public water and sewer (emphasis added). Similarly, Section 100.E.2 of the Zoning Regulations provides that the requirements of the Zoning Regulations adopted October 18, 1993 for the eastern area covered by the 1993 Comprehensive Zoning with respect to the bulk regulations shall apply to any lot described in *a deed* or on an approved subdivision plat and recorded in the land records of Howard County no later than five days after the enactment of these regulations, and unable to fulfill minimum requirements of these regulations (emphasis added.)

In the present case, the Subject Property is a deeded parcel identified on Tax Map 17 as Parcel 742 (Appellants Exhibit Q). It was legally subdivided by deed in accordance with the administrative procedures for disposal of public real property set forth in Section 4.201 and/or exempted from subdivision control jurisdiction pursuant to Section 16.102(b).

How does Parcel 742 accord with the applicable laws and regulations when the County created it in 2006? A first clue is Section 16.114(c)(2) of the Subdivision

Regulations, which instructs developers to design site development plans consistent with the Zoning Regulations, especially in relation to "development densities, the permitted uses of land and the bulk requirements."

As to consistency with bulk requirements, the Zoning Regulations impose two pertinent bulk requirements: minimum lot size, defined as the "smallest lot area allowed by the bulk regulations of the zoning district" (Section 103.A.92) and setbacks controlling the placement of buildings. In the R-20 zoning district where Parcel 742 is located, the pertinent bulk regulations for one single-family detached dwelling are: 1) minimum lot size – 20,000 square feet, 2) minimum lot width at building restriction line – 60 feet, and 3) principal structure setback from an arterial street right of way – 50 feet. Section 108.D.

The dwelling proposed to be constructed on Parcel 742, being 1.42± acres in size and 75±-wide, met the first two requirements, but not the third. In accordance with the regulations at the time of Parcel 742's recordation, Appellants sought to bring the dwelling into compliance with the Zoning Regulations through a zoning area variance.

The variance process is critical both to Appellants' analysis of how a lot becomes buildable and to the appropriate interpretation of the ambiguous phrase in the definition of a lot or parcel. Section 130.B.2 authorizes the Hearing Authority to grant variances from parking requirements and bulk regulations, with three exceptions. Section 130.B.2(a) prohibits the Hearing Authority from granting variances to the density and minimum lot size requirements of the applicable zoning district. Section 130.B.2(a)(3)(a) bars the Hearing Authority from approving a variance if the property owner created the practical difficulties or

hardships requiring the variance, but excepts an owner who purchases a lot subject to the restrictions sought to be varied.

Read together, the variance provisions make clear that a reasonable person purchasing a lot subject to the restrictions sought to be varied could assume it could become buildable, that is, in accordance with the laws and regulations in effect at the time it was recorded, through the variance process. These provisions also manifest a clear legislative intent that a lot lacks the potential to become buildable (as far as the bulk regulations are implicated) if it does not meet the density or minimum lot requirements, or if the property owner created the practical difficulties or hardships requiring the variance.

In my view, to construe the ambiguous phrase in the definition of a "lot or parcel" solely in reference to the Subdivision Regulations would do harm to the purpose of these variance provisions by negating them. This reading would contravene a principal precept of statutory construction: "[I]f there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory." *Green,* 77 Md. App. at 150, 549 A.2d at 765 (1988) (quoting *Ford Motor Land Dev. v. Comptroller of the Treasury*, 68 Md.App. 342, 511 A.2d 578 (1986)), *cert. denied*, *Green,* 315 Md. 307, 554 A.2d 393 (1989).

Indeed, as Ms. McLaughlin acknowledged during cross-examination, the appraiser could have indicated the procedures a buyer could follow to bring it into compliance. DPZ also acknowledged this interpretation of the contested phrase in a meeting with the developer of the Glenmar subdivision, Section 2. The State Highway Administration had condemned portions of several lots in this subdivision, then deeded portions of several lots back to

Boender Properties (or "Glenmar Joint Venture") (Appellants Exhibit FF and JJ). DPZ's Cindy Hamilton made notes from a meeting attended by herself, Ms. McLaughlin, and Bob Boender concerning the development of the lots for single-family detached dwellings (Appellants Exhibit DD).[7] The meeting notes plainly raise concerns about the lots Mr. Boender proposed. The notes state the lots are too small, but that Ms. McLaughlin would support two lots (114 and 119) with the others merged into them. Importantly, they also state lots 114, 115 and 116 may need variances to make them buildable.

The definitional sense of the ambiguous phrase "in accordance with the laws and regulations in effect at the time of recordation" argued by Appellants creates a logical framework for the consistent definition of "lot or parcel" throughout Howard County's land use development statutory scheme, an administrative procedure for potentially making substandard lots buildable, unless they fail to meet density or minimum lot size requirements or if the owner created the practical difficulties or hardships requiring the variance. Reading this reasonable interpretation back into the Subdivision Regulations, Appellants' argument as to how a lot becomes buildable is a plausible construction. This interpretation is also

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[7] DPZ objected to the admission of this documentary evidence on relevancy grounds. Mr. Serio argued specifically against the admission of Appellants Exhibit DD for lack of foundation. I note as a first matter the Hearing Examiner is not bound by the strict rules of evidence under Hearing Examiner Rule 9.1, which instructs the examiner to consider and give appropriate weight to any relevant evidence as is commonly accepted by reasonable and prudent persons in the conduct of their affairs.

Authentification is a more specific application of the requirement of relevancy. As the trier of fact, I resolved the authentification of this nontestimonial evidence based on Mr. Meachum's demonstration that the writing was Ms. Hamilton's and that it was copied from a public record. I also stated at the proceeding that I had no trouble reading the document. The document is relevant because it establishes a policy of DPZ acting, at least once, in accordance with Section 16.102(b) and of working with a property owner to bring lots divided by deed into compliance with the zoning regulations so that they may be usable as buildable lots.

consistent with my foregoing conclusions about the applicability of Section 16.102(b), and to the broader conclusion that acts of the state legislature or its instrumentalities do not include or affect the rights of government.

One of the early purposes in the evolution of subdivision regulations legislating land platting was to provide a more efficient method of conveying property. *Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992).* Subdivision control helped to avoid the old problem of selling land by reference to metes and bounds. See D. Hagman & J. Juergensmeyer, Urban Planning and Land Development Control Law § 7.2, at 191 (2d ed. 1986). When Howard County adopted subdivision regulations in 1961, it expressed this policy as a legislative intent to "[a]ssist[] County officials in securing adequate records of land titles." Section 16.101(14). The County's division of land by transferring title to a portion of public real property to Appellants comported with this intent, the Subject Property being duly identifiable as that depicted on Map 17, Grid 12, as Parcel 742 by the Maryland Department of Assessments and Taxation.

A second early purpose of subdivision regulations was to ensure the orderly development of land by requiring a subdivider to lay out and construct streets and other improvements. *See id.* In the second half of the twentieth century, subdivision control evolved into a mechanism to ensure compliance with an extensive field of substantive regulation, including the availability of adequate public facilities--schools, parks or open space, and public or private water and sewage. More recently, subdivision control has been invested with a fourth purpose, environmental protection, including the regulation of steep slopes, forests, and other critical environmental land features.

What subdivision control may not regulate is lot size and bulk requirements, which are the sole provinces of zoning regulations. Thus, any DPZ decision to deny review and processing of a plan because it does not comply with bulk requirements in effect when a property was conveyed is beyond its subdivision control jurisdiction.

The legislative intention behind the variance procedure and other administrative relief mechanisms in the land development review and approval statutory scheme is to offer property owners the potential of complying with laws and regulations, not to strip them of their property rights through a regulatory taking. The right to petition for potential regulatory relief is part of the bundle of rights acquired by purchaser when he or she takes title to property. A property owner potentially obtains such relief and ascertains if a lot is usable as a buildable lot by processing the proposed development.

DPZ's processing of the Glenmar Subdivision, Section 2, subsequent to the State's returning title to a portion of the property it had condemned, illustrates how DPZ works with a property owner who takes title to land conveyed by deed via Section 16.102(b), albeit from a state agency, to make the land usable as buildable lots. In this example, Boender Properties wanted to construct several single-family detached dwellings on the reacquired property. DPZ opposed the proposal because the lots were two small, but eventually blessed a SHA resubdivision by deed that reconveyed two oddly shaped lots to the owner. The lots were processed and approved as SDP 07-025. In short, the County worked with the developer to ensure the lots met zoning requirements even though the new were never recorded in the Land Records pursuant to a formal subdivision of land under Section 144-147.

In this case, the County conveyed title to Appellants by deed, in accordance with the laws and regulations in effect. Because Appellants proposed to place a dwelling in a setback, they applied for variance relief. In BA Case No. 06-047V, Hearing Examiner Earnest Stokes granted Appellants their variance application to reduce the 50-foot arterial road setback to 35 feet. (Appellants Exhibit "0" and Serio Exhibit 1). Mr. Serio unsuccessfully appealed the decision to the Board of Appeals, the Howard County Circuit Court, and the Court of Special Appeals. With the granting of Appellants' variance, the Hearing Authority determined Parcel 742 to be in accordance with the zoning laws and regulations at the time the County subdivided the parcel by deed.

It has not yet been determined that Parcel 742 is usable as a buildable lot. According to the record, there are access and noise issues. An Adequate Public Facilities "schools test" must be applied when and if the SDP become technically complete. Further processing will determine if the Subject Property is usable as a buildable lot.

C. Estoppel

Appellants lastly argue DPZ is estopped from concluding the Subject Property is not a "buildable" lot because they relied on the County's representation to their detriment, incurring costs not only to purchase the property, but also monies expended on seeking a variance to which the County did not object.

Maryland courts do not recognize zoning estoppel as a defense against governmental zoning actions when no rights have vested in the property. Vesting is established only when a property owner obtains a building permit and completes substantial construction. *Sycamore Realty Co., v. Peoples Counsel of Baltimore County*, 344 Md. 57, 684 A.2d 1331 (2007).

Because their argument of zoning by estoppel is inapplicable to the facts in this case, this ground for appeal is dismissed.

Conclusion

Following this analysis, I conclude Appellants have demonstrated by substantial evidence that DPZ's determination that Appellants' have not demonstrated the Subject Property is not a "buildable" lot is clearly erroneous, and/or arbitrary and capricious, and/or contrary to law.

ORDER

Based upon the foregoing, it is this **30th day of September 2009**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Gregory & Tatyana Baytler with respect to their estoppel claim is **DISMISSED**;

That the letter dated February 25, 2009 from the Howard County Department of Planning to Gregory & Tatyana Baytler concluding they have not established the subject property is a legally buildable lot (SDP-08-086, Baytler Property, Single-Family Detached Dwelling, TM 17, Parcel 742) is hereby **REVERSED** and **REMANDED** to DPZ for further action consistent with this Decision and Order.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

Michele L. LeFaivre

Date Mailed: 10/2/09

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.